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IN THE

Supreme Court of the United States

GENERAL COMMITTEES OF ADJUSTMENT GO-386 and GO-245 OF THE UNITED TRANSPORTATION UNION,

and

UNITED TRANSPORTATION UNION,

Petitioners,

v.

THE BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Multi-employer bargaining (which in the rail industry is called "national handling") is a permissible form of bargaining under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and, indeed, has been an accepted form of bargaining in the rail industry for more than a half-century. This case presents the following questions concerning multi-employer bargaining under the Railway Labor Act:

1. Is multi-employer bargaining under the Railway Labor Act entirely consensual, as the United States Courts of Appeals for the Sixth and Eighth Circuits have held, relying upon the right that Section 2 Third of the Act, 45 U.S.C. § 152 Third, gives to a party to designate its bargaining agent free from interference by the other party, or may that form of bargaining be obligatory as the United States Court of Appeals for the District of Columbia Circuit has held in this case, relying upon the duty imposed upon carriers and employees by Section 2 First of the Act, 45 U.S.C. § 152 First, "to exert every reasonable effort to make and maintain agreements"?

2. If the District of Columbia Circuit is correct and national handling may be obligatory, may a federal court, in construing the duty imposed by Section 2 First "to exert every reasonable effort to make and maintain agreements[,]" compel multi-employer bargaining because, objectively reviewing the bargaining history of the parties, that bargaining is a "reasonable effort," even though the party being compelled is acting in good faith in opposing national handling, since bargaining through the agent it is being compelled to accept as its negotiator will prevent it from insisting upon the resolution of issues that are important to it but not to others bargaining through that same negotiator?

PARTIES

Petitioners, who were appellees in the Court of Appeals, are:

General Committee of Adjustment GO-386 of the United Transportation Union;
General Committee of Adjustment GO-245 of the United Transportation Union; and
United Transportation Union.

General Committee of Adjustment GO-291 of the United Transportation Union, which was a plaintiff and appellee below, merged with petitioner GO-386, effective Dcember 1, 2002.

Respondents, who were appellants in the Court of Appeals, are:

The Burlington Northern and Santa Fe Railway Company;
Consolidated Rail Corporation;
CSX Transportation, Inc.;
Kansas City Southern Railway Company;
Norfolk Southern Railway Company;
Union Pacific Railroad Company;
Manufactures Railway Company;
Peoria & Pekin Union Railway Company;
Portland Terminal Railroad Company;
Terminal Railroad Association;
Utah Railway Company;
Winston Salem Southbound Railway Company; and
Robert F. Allen, in his capacity as Chairman of the National Carriers' Conference Committee

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Petitioners,

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Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioners, General Committees of Adjustment GO-386 and GO-245 of the United Transportation Union[1] and the United Transportation Union (UTU), respectfully request that this Court issue a writ of certiorari to the United States Court

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[1] Throughout this litigation, there was a third Committee participating with General Committees GO-386 and GO-145. However, effective December 1, 2002, that third Committee, General Committee GO-291, merged with petitioner GO-386, with petitioner GO-386 being the surviving Committee.

of Appeals for the District of Columbia Circuit to review the judgment of that court in *General Committee of Adjustment GO-386 v. Burlington Northern and Santa Fe Ry.*, 295 F.3d 1337 (D.C. Cir. 2002), in order to resolve a conflict among the circuits on important issues concerning the proper interpretation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the role of federal courts in enforcing the commands of that Act.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reproduced in Appendix A to this petition, is reported at 295 F.3d 1337. The opinion of the United States District Court for the District of Columbia, whose judgment the court of appeals vacated, is reported at 141 F.Supp.2d 49, and is reproduced as Appendix B to this petition, beginning at 8a.

JURISDICTION

The decision of the court of appeals was issued on July 19, 2002. Petitioners filed a timely petition for rehearing *en banc* on August 19, 2002, which was denied by the court of appeals on September 9, 2002. App. D at 28a. The petition to this Court is timely under 28 U.S.C. § 2101(c). Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the proper interpretation and application of Sections 2 First and 2 Third of the Railway Labor Act, 45 U.S.C. §§ 152 First, and 152 Third, which are reproduced in Appendix E to this petition, beginning at 30a. Sections 1 Sixth, 2 Second, and 6 of the Railway Labor Act, 45 U.S.C. §§ 151 Sixth, 152 Second, and 156, are also relevant and they, too, have been reproduced in Appendix E.

STATEMENT OF THE CASE

This petition asks the Court to resolve a conflict among the circuits concerning whether a party to collective bargaining under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, may be compelled to participate in multi-employer bargaining, which in the rail industry is termed "national handling"–*i.e.*, bargaining for a "national contract" through a "national bargaining representative."[2] According to the United States Courts of Appeals for the Eighth and Sixth Circuits in *ARASA v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *cert. denied*, 498 U.S. 809 (1990), and *UTU v. Grand Trunk Western R.R.*, 901 F.2d 489 (6th Cir.), *cert. denied*, 498 U.S. 815 (1990), participation in "national handling" is entirely consensual and turns on the right which Section 2 Third of the Act, 45 U.S.C. § 152 Third, gives a party to decide, without coercion by another party, whether to allow the national negotiator to negotiate on its behalf. However, according to the United States Court of Appeals for the District of Columbia Circuit in the case at bar, relying upon its earlier decision in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968), national handling may be obligatory, depending on whether the district court concludes from an objective assessment of the parties' past bargaining practices that such bargaining constitutes a "reasonable effort," which the court may then compel in enforcing the duty imposed by Section 2 First of the Act "to exert every reasonable effort to make . . . agreements . . . ." 45 U.S.C. § 152 First. Resolving this conflict among the circuits also presents the issue left open in *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 579 n.

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[2] National handling today is a misnomer, for during the last two rounds of bargaining, the first which began in 1994 and the second in November 1999, three of the eight Class I railroads (*see*, 49 C.F.R. § 1201.1-1(a)) bargained individually–*i.e.*, "locally"–and *not* through the NCCC. Joint Appendix in D.C. Cir. Nos. 01-7068 & 01-7069 (JA) at 312, ¶ 12.

11 (1971), whether federal courts, in enforcing Section 2 First, may require more of the parties than avoidance of "bad faith."

This litigation began in November 1999, shortly after respondent Burlington Northern and Santa Fe Railway Company (BNSF)[3] and twenty-six (26) other railroads with which the BNSF was bargaining through the National Carriers' Conference Committee (NCCC),[4] served notice upon the UTU under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, that they wished to negotiate on a multi-employer basis changes to existing collective bargaining agreements which covered employees represented by the UTU. Petitioner UTU informed the carriers that the union's National Negotiating Committee would bargain on a "national basis" on behalf of those UTU Committees which had elected to bargain through that negotiating committee,[5] but petitioner UTU also informed the NCCC that the

---

[3] Respondent BNSF, one of eight remaining Class I railroads in this country, is the product of mergers, particularly during the past thirty-two years. It operates a 33,500 mile rail system in the western two-thirds of the United States, employing a work force of more than 44,500 employees. JA at 1053.

[4] The NCCC is an association made up primarily of the chief labor relations officers of Class I railroads engaged in national handling. JA at 1052, pp. 13-14. A carrier which wishes to bargain "nationally" must expressly authorize the NCCC to bargain on its behalf by providing the NCCC with a "power of attorney." JA at 310-12; 1052, p. 15.

[5] Article 91 of the UTU's Constitution provides that the Chairpersons of the General Committees for the rail lines in the United States are to form an Association and if a majority of the Chairpersons in that Association authorize a "concerted movement[ ] relating to wages, rules, and working conditions" (JA at 261, Art. 91), the UTU's chief International officers are to appoint a negotiating committee to "assist in the prosecution of the wage-rules movement as directed by the International President." *Id.* General Committees that do not wish to participate in the concerted movement may be excused by majority vote of the association and approval of the International President. *Id.*

negotiating committee would not be bargaining on behalf of those Committees which had elected *not* to bargain through the UTU's National Negotiating Committee, such as GO-386, GO-245, and GO-291.[6] On November 24, 1999, the BNSF and eleven other railroads bargaining through the NCCC filed suit against petitioner UTU in the United States District Court for the District of Columbia, seeking to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.* As relevant here, the railroads sought a declaratory judgment and an injunction to require the UTU to bargain with the NCCC on behalf of all employees the UTU represented on the carriers which had selected the NCCC as their negotiator.[7]

On January 7, 2000, three of the UTU General Committees of Adjustment that had elected not to participate in national

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[6] Although the UTU is the "duly designated" representative of several crafts or classes of operating employees on our nation's railroads, the UTU's Constitution delegates to subordinate bodies within the UTU, known as General Committees of Adjustment, "the authority to make and interpret agreements with representatives of transportation companies covering rates of pay, rules, or working conditions . . . ." JA at 259, Art. 85. Generally, the authority of each General Committee is limited to a specific railroad or railroads and its or their agreements. This bargaining structure is typical in the rail industry. Since all Class I railroads today are the products of mergers where the parties have generally agreed to preserve the basic collective bargaining agreements, called "schedule agreements" (JA at 103), the preservation of the basic agreement usually preserves the Committee as well. Thus, there are typically more than one General Committee for each of the larger unions on each Class I railroad. For example, prior to the merger of GO-386 and GO-291, there were 11 UTU General Committees on the BNSF, each with exclusive authority for specific portions of the BNSF system.

[7] Respondents also sought declaratory and injunctive relief to require petitioner UTU to bargain "system-wide" on the BNSF. The court of appeals did not reach that issue in its disposition of this case, finding that it was "not yet ripe for decision" (App. A at 5a), and, therefore, this petition does not address that issue.

handling, namely petitioners GO-386 and GO-245, along with GO-291, filed suit against the BNSF and against the NCCC through its chairman, Robert F. Allen. The three Committees, which represented over three thousand of the eleven thousand BNSF employees who have selected the UTU as their collective bargaining representative, invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) to enforce the Railway Labor Act, seeking declaratory and injunctive relief to require the BNSF to bargain with the Committees over the changes that the BNSF had proposed be made to the collective bargaining agreements that the Committees have been designated by the UTU to make and maintain with the BNSF.[8]

The three Committees explained to the district court that they had decided not to participate in national handling because the contract changes that were important to the employees covered by the agreements they administered differed from the concerns that the other Committees wished to address in the planned concerted movement, and that to achieve a satisfactory resolution on their "local issues," they needed the flexibility to trade economic considerations for quality of life issues. JA at 216-18, ¶ 19. This, in turn, required that all issues be bargained together in a "local" setting. *Id.*

Significantly, there is no genuine dispute in this case over the fact that the three Committees, by declining to participate

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[8] The UTU's National Negotiating Committee and the NCCC reached a tentative agreement in September 2000 (JA at 591, ¶ 30), but questions arose as to the terms of the agreement. Those questions were resolved by May 2002, and the tentative agreement was ratified by the affected membership in August 2002. However, the membership of the three Committees did not participate in that ratification process, and, thus, another question that must be resolved by this litigation is whether the national agreement, as respondents assert, applies to the employees for whom the three Committees bargain.

in national handling, are not acting with a "desire not to reach an agreement" on the changes that the BNSF, through the NCCC, proposed be made to the schedule agreements those Committees make and maintain. Rather, as the BNSF's Vice President of Labor Relations, who is also the BNSF's representative on the NCCC, testified at his deposition, he had discussed with the three General Chairpersons their reasons for not agreeing to participate in national handling, and he did not conclude from those discussions that they were acting in bad faith. JA at 381, pp. 78-79. Additionally, the BNSF and the NCCC knew before the carriers served their Section 6 notice to begin the 1999 round of bargaining that the three Committees had not agreed to participate in national handling. JA at 541-42.

The General Committees' case was consolidated with the suit that the BNSF and the other carriers had brought against the UTU, and all parties cross-moved for summary judgment. On March 28, 2001, the district court, by United States District Judge Emmet G. Sullivan, issued a Memorandum Opinion and Order granting the motions by the UTU and the three Committees for summary judgment. With respect to the issue raised by this petition–whether multi-employer bargaining may be compelled–the district court was faced with the contention by the carriers that the court's analysis was controlled by the circuit's decision in *Atlantic Coast Line*, in which the court of appeals, although rejecting the claim that national handling should be compelled in that case, stated as follows concerning the issue (383 F.2d at 229; emphasis added):

> What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. *Whether it is*

> *also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. . . .*

Petitioners, on the other hand, relied in part upon the decision by this Court in *Chicago & North Western Ry. v. UTU*, 402 U.S. 570 (1971), to argue that the license that *Atlantic Coast Line* appeared to give district courts to intrude into the collective bargaining process must be read in the light of this Court's admonition that, in cases enforcing the duty imposed by Section 2 First of the Act, "great circumspection should be used in going beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." 402 U.S. at 579, n. 11. Petitioners also argued that this case was not controlled by *Atlantic Coast Line* because the right that Section 2 Third gives each party to designate its bargaining agent was involved in this case but was not considered by the *Atlantic Coast Line* court. Section 2 Third, as it applies to the dispute over national versus local bargaining, petitioners noted, was considered and found to be controlling by every court outside of the District of Columbia Circuit that has addressed this dispute, such as the Eighth Circuit in *ARASA v. Soo Line R.R.*, *supra*, and the Sixth Circuit in *UTU v. Grand Trunk Western R.R.*, *supra*.[9]

Recognizing that "the identity of the [bargaining] representative and the structure of the bargaining cannot always be separated . . . . [for in] some cases, such as these, one necessarily effects the other" (App. B at 20a), the district court concluded that what was "at issue in these cases is the

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[9] *See also, UTU v. Chicago & Illinois Midland Ry.*, 731 F.Supp. 1336 (C.D. IL 1990), and *UTU v. Illinois Central R.R.*, 731 F.Supp. 1332 (N.D. IL 1990).

employees' method, through UTU, of designating their own bargaining representative." *Id.* This meant that Section 2 Third, as applied by the Eighth and Sixth Circuits, was controlling. App. B at 20a-21a. But that did not mean that Section 2 First was irrelevant, for, as the district court explained (*Id.*):

> Both parties could behave reasonably and act in good faith, but still disagree about whether to bargain nationally or locally. On the other hand, if one party insists on bargaining locally in an effort to avoid reaching an agreement, that party would be acting in bad faith, would not be exerting every reasonable effort, and could be compelled by a court under Section 2 First to bargain on a national handling basis.

Relying upon its interpretation of the relationship between Sections 2 First and 2 Third, the court stated (App. B at 21a-22a):

> If the parties were already engaged in national handling when this dispute arose, and the three General Committees refused to bargain further unless the carriers would negotiate local agreements, the situation might be different. However, here the dispute arose before any bargaining began. This Court finds that under these circumstances, where UTU and the General Committees have legitimately designated representatives under Section 2 Third and are not acting in bad faith, the RLA does not authorize the Court to dictate the conditions under which the parties must bargain before any bargaining has even begun.

On appeal, the court of appeals concluded that Section 2 Third, with its prohibition against interference with the designation of bargaining representatives, was not controlling, for the issue was the scope of that bargaining–*i.e.*, whether it was to be national or local. App. A at 5a. That issue, the court held, was governed by its 1967 decision in *Atlantic Coast Line*, which requires the district court to make

"'an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.'" App. A at 5a, *quoting Atlantic Coast Line*, 383 F.2d at 229. This requires the court to make an "objective assessment" of the parties' past bargaining practices. App. A at 5a. However, in this case the district court "departed from that test by applying a subjective good faith test arguably consistent with the Eighth Circuit's treatment of the issue in *Soo Line*, because it saw Section 2 Third as potentially inconsistent with a result applying Section 2 First under *Atlantic Coastline* [*sic*]." *Id.* Since the district court applied what was to the appellate court the wrong standard, the court of appeals vacated the district court's judgment and remanded for the district court to apply "the test of *Atlantic Coastline* [*sic*] and review[ ] objectively the bargaining history of the parties." App. A at 6a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A CONFLICT AMONG THE CIRCUITS ON IMPORTANT ISSUES CONCERNING THE PROPER INTERPRETATION OF THE RAILWAY LABOR ACT AND THE ROLE OF FEDERAL COURTS IN ENFORCING THE DUTY IMPOSED BY SECTION 2 FIRST OF THAT ACT "TO EXERT EVERY REASONABLE EFFORT TO MAKE AND MAINTAIN AGREEMENTS . . . ."

According to the court of appeals, this case presents a "relatively straightforward" issue: "when and under what circumstances may a carrier or union under the RLA [the Railway Labor Act, 45 U.S.C. § 151, *et seq.*] compel an opposing party to bargain on a national or local level, as chosen by the party seeking to compel the negotiations?" App. A at 3a. That issue, however, is anything but straightforward, for it raises the fundamental question

whether multi-employer bargaining may be compelled in the first place, and this, in turn, implicates two fundamental principles upon which the Railway Labor Act is premised; namely, the obligation that Section 2 First of the Act imposes on carriers and their employees "to exert every reasonable effort to make and maintain agreements" (45 U.S.C. § 152 First), and the protection that Section 2 Third of the Act gives the parties to designate their bargaining agent "without interference, influence, or coercion by either party over the designation of representatives by the other . . . ." 45 U.S.C. § 152 Third.

The proper interpretation of the relationship between these two provisions of the Railway Labor Act is clearly important to the administration of the Act itself. This Court has frequently described the duty imposed by Section 2 First as being the "heart" of the Act. *E.g.*, *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 574 (1971). And, it has held that the "[f]reedom of choice in the selection of representatives on each side of the dispute [which Section 2 Third guarantees] is the essential foundation of the statutory scheme." *Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 569 (1930).[10] Moreover, this Court has held that *both* statutory provisions may be enforced by the federal courts. *Chicago & North Western Ry.*, 402 U.S. at 577 ("[W]e think it plain that § 2 First was intended to be more than a

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[10] *Texas & New Orleans* involved the interpretation of § 2 Third as enacted by Congress in 1926. Railway Labor Act, § 2 Third, 44 Stat. 577, 578. Four years after *Texas & New Orleans* was decided, Congress amended the Act *inter alia* by providing that a majority of a craft or class may select the bargaining representative for the craft or class (§ 2 Fourth, 48 Stat. 1185, 1187), by providing that the National Mediation Board (NMB) was to resolve disputes *among employees* as to who their representative was (§ 2 Ninth, 48 Stat. at 1188-89), and by strengthening the prohibition in § 2 Third by adding that "neither party *shall in any way* interfere with, influence, or coerce the other in its choice of representatives." 48 Stat. at 1187 (emphasis added).

mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever means might be developed on a case-by-case basis"); *Texas & New Orleans R.R.*, 281 U.S. at 567-70 (Congress intended courts to enforce § 2 Third).

Section 2 First, as the court of appeals held in this case, is implicated because the request of one party that the other bargain "nationally," raises the questions, first, whether such bargaining is a "reasonable effort" and, second, whether a federal court may enforce Section 2 First by *compelling* that form of bargaining–*i.e.*, that "reasonable effort." On the other hand, as the Eighth and Sixth Circuits held in *ARASA v. Soo Line R.R.*, 891 F.2d 675 (8th Cir. 1989), *cert. denied*, 498 U.S. 809 (1990), and *UTU v. Grand Trunk Western R.R.*, 901 F.2d 489 (6th Cir.), *cert. denied*, 498 U.S. 815 (1990), Section 2 Third is also implicated. This is so because the goal of multi-employer bargaining is one agreement that applies to all [11] and this, in turn, requires that those participating in multi-employer negotiations designate a common bargaining agent–such as the NCCC, for the carriers, or the UTU's National Negotiating Committee for the participating General Committees.

Thus, as the Eighth and Sixth Circuits have recognized–but as the District of Columbia Circuit finds not to be controlling–the right which Section 2 Third gives each party to select its own bargaining agent means that Section 2 First cannot be used to compel one party to participate in multi-

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[11] *Delaware & Hudson Ry. v. UTU*, 450 F.2d 603, 611 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971) ("The obligation to bargain collectively may fairly comprehend a duty to bargain on a national handling basis, and to seek to reach a national agreement. . . . [T]he duty is to bargain in good faith, which means an absence of bad faith, and an effort to pursue single agreements [*i.e.*, an individual agreement with a party bargaining nationally] may be taken as undercutting an obligation to conduct national bargaining in good faith").

employer bargaining because to use the duty imposed by Section 2 First in that manner would require the party being compelled to bargain through an agent it has not selected, contrary to the guarantee that Section 2 Third provides to select bargaining agents without "interference, influence, or coercion" by the other party. *Soo Line*, 891 F.2d at 679 ("The railroad has a statutory right to designate its own representative; it has no obligation to accept national bargaining and is not bound by national negotiations in which it chooses not to participate"). This approach to the relationship between Sections 2 Third and 2 First, as the *Soo Line* court noted (891 F.2d at 678), is also consistent with the principles developed under the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*, to govern multi-employer bargaining, which recognize the consensual nature of such bargaining. *E.g.*, *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982) ("The Board has recognized the voluntary nature of multiemployer bargaining. It neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining").

This underlying dispute over whether multi-employer bargaining may be obligatory is not of recent vintage, for it has occurred on various occasions for more than sixty years. *See* App. A at 4a. In its early annual reports, the National Mediation Board (NMB) frequently commented on the advantages to be obtained from national handling (*e.g.*, Third Annual Report of NMB at 2-3 (1937)), but in 1940 the NMB stated that: "However, as advantageous as is the handling of such disputes on a national or regional basis, the Board definitely ruled during the past year that it was not authorized under the act to require such handling on the part of either the carriers or their employees. This method can be effected only by the agreement or consent of the parties involved." Sixth Annual Report of NMB at 5 (1940).

This changed somewhat in 1967 when the District of Columbia Circuit decided *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968), in which the court stated (383 F.2d at 229):

> What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. . . .

This indicated that national handling could be obligatory *if*, under a Section 2 First analysis, it was found to be a reasonable effort.

Relying upon *Atlantic Coast Line*, rail labor sought to use Section 2 First to compel the Soo Line Railroad in 1988 to continue to bargain health and welfare issues nationally. However, the *Soo Line* court rejected the *Atlantic Coast Line* court's Section 2 First analysis because, the Eighth Circuit concluded, the controlling statutory provision was Section 2 Third with its protection of the designation of bargaining agents. 891 F.2d at 678 ("The unions' argument [relying on § 2 First] ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate"). The Eighth Circuit also explained that: "No . . . statutory provision obligates the railroad to designate a national, multi-carrier representative to conduct its negotiations." 891 F.2d at 678. As indicated above, the Sixth Circuit in *Grand Trunk* and the other courts which addressed this issue during the 1988 round of bargaining (*see* note 9, *supra*), agreed with the Eighth Circuit that the controlling statutory provision was Section 2 Third, not Section 2 First.

Soo Line and *Grand Trunk* did not resolve this dispute over whether multi-employer bargaining may be compelled, for when the next round of bargaining began in 1994,[12] the parties became involved in a race to the courthouse with those parties which wished to compel national handling (this time, the railroads) filing their suit in the District of Columbia, while those opposing national handling (several unions) sought to litigate this dispute in the Sixth and Eighth Circuits. *See Alton & Southern Ry. v. BMWE*, 1995 WL 338544 (D.D.C.) *1. The railroads won the race to the courthouse, but the ensuing litigation did not bring closure to the issue, for the parties settled their contract disputes before the dispute was heard by the court of appeals. *Alton & Southern Ry. v. BMWE*, 928 F.Supp. 7 (D.D.C. 1996), *appeal dismissed as moot*, D.C. Cir. No. 96-7104 (February 10, 1997). Instead, the *Alton & Southern* litigation intensified the dispute because the district court compelled national handling.

True to form, when the next round of bargaining began in 1999, the railroads once again raced to the courthouse in the only circuit favorable to the position they are currently espousing that national handling may be compelled. This time their request was rejected by the district court because it saw the dispositive statutory provision as being Section 2 Third. App. B at 20a ("[T]he identity of the representative and the

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[12] Collective bargaining agreements in the rail industry, in light of the Railway Labor Act's status quo obligation, generally do not have "duration" clauses; rather, the parties to recurring agreements, such as those dealing with rates of pay, normally include "moratorium" clauses by which the parties agree that, for the duration of the moratorium, neither will serve a notice under Section 6 of the Act to change any item resolved by that agreement or any other item that the parties agree to include within the scope of the moratorium. JA at 310, ¶ 6; 340, ¶ 6. The agreement resolving the round of bargaining that began in 1988 included a moratorium clause barring Section 6 notices on wages or rules prior to 1994, and the agreement concluding the 1994 round of bargaining barred such notices until November 1, 1999. JA at 318, ¶ 30; 350, ¶ 30.

structure of the bargaining cannot always be separated. In some cases, such as these, one necessarily effects the other"). However, on appeal the court of appeals rejected the district court's reliance on Section 2 Third, for the appellate court viewed the issue as being "the *scope* of bargaining (national or local)" (App. A at 5a; emphasis in original), which was to be decided by the Section 2 First analysis set forth in *Atlantic Coast Line*. This analysis, the court of appeals held, required the district court to make "an objective assessment" of the parties past bargaining practices to determine whether national handling was a reasonable effort that the court could compel the party opposing that form of bargaining "to exert." App. A at 5a.

Petitioners respectfully submit that the correct relationship between Sections 2 First and 2 Third–*i.e.*, the issue upon which the circuits are in conflict–presents an issue that is crucial to the proper administration of the Railway Labor Act and to the role of the federal courts in enforcing that Act. The underlying dispute over whether multi-carrier bargaining may be compelled has been raised during *each* round of bargaining since 1988. Now that the District of Columbia Circuit has reaffirmed *Atlantic Coast Line* and stressed that it requires the district court to make an "objective assessment" of the parties bargaining practices, it is clear that this dispute and the race to the courthouse will occur again and again until this Court resolves this dispute. In the interim, as occurred during the last three rounds of bargaining, bargaining will be delayed, contrary to the command of the Act that such disputes "be considered, and, if possible, decided with all expedition . . . ." 45 U.S.C. § 152 Second.

Moreover, until this dispute is resolved by this Court, a party involved in the bargaining where the parties desiring national handling win the race to the courthouse–*i.e.*, the courthouse in the District of Columbia–may be required to bargain through a bargaining agent it has not chosen and to

forego legitimate bargaining demands simply because the other parties bargaining through that agent do not consider those "local" issues to be important. Additionally, under the court of appeals interpretation of Section 2 First in this case, the district court for the District of Columbia will be required to make an "objective assessment" of the parties' past bargaining practices and may, based upon that assessment, compel multi-carrier bargaining, despite the fact that the parties being compelled, as in this case, "have not acted with a desire not to reach an agreement" and "are not driven by a desire to thwart the bargaining process." App. B at 21a. This allows a party to the bargaining to use the district court as a means to preclude the party opposing national handling from pressing to impasse legitimate, but parochial, bargaining demands, contrary to the admonition of this Court in *Chicago & North Western Ry. v. UTU*, 402 U.S. at 579, n. 11, that "great circumspection should be used [by federal courts in enforcing Section 2 First] in going beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." It also gives the federal courts, in determining whether national handling is a "reasonable effort," the power to devise the ground rules for such bargaining under the Railway Labor Act, something that Congress has not authorized the courts to do under the NLRA (*e.g.*, *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. at 416-17), despite the greater role that Congress has given the federal courts under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), to develop federal law for suits enforcing collective bargaining agreements–a power which Congress has withheld from the courts for contracts under the Railway Labor Act.

Since most unions and major carriers subject to the Railway Labor Act operate in more than one circuit and are subject to suit throughout the United States, including, for

most, in the District of Columbia, the need for uniformity in the interpretation and application of this Act is extremely important. Where, as here, that uniformity is lacking, the parties will seek to involve the courts in their bargaining disputes, especially where, as here, one circuit holds itself out as being able to regulate the shape of the bargaining table.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO RESOLVE THE DISPUTE OVER WHETHER MULTI-CARRIER BARGAINING MAY BE COMPELLED.

This case, petitioners submit, presents an excellent vehicle for this Court to resolve the dispute over the proper relationship between Sections 2 First and 2 Third and to determine the role of the federal courts when faced with a demand by one party that the court compel the other party to participate in multi-carrier bargaining. Here, the appellate court vacated the district court's judgment on cross-motions for summary judgment because, in the court of appeals' opinion, the district court had applied the wrong standard. This raises a purely legal issue concerning the proper relationship between Sections 2 First and 2 Third. It also presents the question whether the district court, on remand, may, because of its "objective assessment" of past bargaining practices, compel a party that clearly desires to reach an agreement to participate in bargaining in a forum where the party being compelled must designate a bargaining agent it has previously rejected and will be precluded from bargaining to impasse on bargaining demands that are important to it but not to the other parties represented by the bargaining agent it is being compelled to accept.[13]

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[13] Respondents have argued below that this case does not present the § 2 Third issue as in *Soo Line* or *Grand Trunk* because § 2 Third, when applied to the employee side of the bargaining table, protects only the right of employees to select their representative, and not the right of that

Although the court of appeals' decision does not explain in detail the reasoning it employed, the court clearly stated that, in its opinion, Section 2 Third was "not the governing provision" and that the issue before it was "the scope of bargaining–that is, whether it is locally or nationally handled–not the related but distinct question of designation of the bargaining representative." App. A at 5a. That issue, the court stated, was controlled by its earlier decision in *Atlantic Coast Line*. *Id*. Moreover, the court of appeals observed that the test set forth in *Atlantic Coast Line* requires the district court to make an "objective assessment" of the parties' past bargaining practices, and that this "was the interpretation [of *Atlantic Coast Line*] applied in *Alton and Southern* [928 F.Supp. 7] and, in our view, it is the correct one." App. A at 5a. Since the district court in *Alton & Southern* discussed in detail its interpretation of the relationship between Sections 2 First and 2 Third in explaining why the court was to make an objective assessment–and *not* look to the subjective good faith of the party opposing national handling–this Court has before it the rationale that the courts used to reach their conflicting positions. Additionally, since the record in this case shows without dispute that the three Committees "have not acted with a desire not to reach an agreement" but, rather, "have legitimate reasons for wanting to bargain locally and to

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representative to select its negotiator. That argument, petitioners submit is without merit. Section 2 Third expressly provides that the "[r]epresentatives of the employees . . . need not be persons in the employ of the carrier" (45 U.S.C. § 152 Third), and § 1 Sixth of the Act defines the term "representative" as "any person . . . designated by . . . employees, to act for . . . them." 45 U.S.C. § 151 Sixth. Thus, the term "representative" as used in § 2 Third obviously means not only the UTU but also the persons or entities that the UTU designates to bargain with the carrier–*i.e.*, the union's bargaining agent. In this case, the three Committees are bargaining agents and § 2 Third protects them from being "coerced" by respondents–or by a court–into ceding that bargaining authority to the bargaining agent the carriers would rather bargain with–the UTU's National Negotiating Committee.

reach individual agreements" (App. B at 21a), this case presents the issue that this Court left open in *Chicago & North Western Ry. v. UTU*, 402 U.S. at 579, n. 11, whether Section 2 First requires more of the parties than the avoidance of bad faith.

In *Alton & Southern*, the district court recognized that there was a need to examine the application of Section 2 Third to this dispute, but then stated that Section 2 Third could not be read as "trumping" Section 2 First as construed by *Atlantic Coast Line*. 928 F.Supp. at 15-16. Section 2 Third, the *Alton & Southern* court opined, was intended "to protect the identity of the representative, not the scope of his or her representation." 928 F.Supp. at 16. The latter question, the court stated, was to be determined by "an objective determination as to what is reasonable rather than the subjective standard proffered by" the union–which was the subjective good faith of the party opposing multi-carrier bargaining. 928 F.Supp. at 14. According to the *Alton & Southern* court: "To engage in a subjective analysis would transfer the dispositive determination [as to the scope of the bargaining] from the courts to the parties." *Id.*

With all due respect to the *Alton & Southern* court and to the court of appeals below, the "dispositive determination" as to the scope of the bargaining agent's authority belongs with the parties, *not* with the courts. To give that power to the federal courts–*where there is no showing of an attempt to avoid an agreement*–is to ignore the admonition of this Court in footnote 11 of its decision in *Chicago & North Western* and the principles of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, which govern the exercise of injunctive powers by federal courts in labor disputes. 402 U.S. at 583 ("Finally, the vagueness of the obligation under § 2 First could provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place").

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that the writ be granted.

Respectfully submitted,

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